

**BEFORE THE MONTGOMERY COUNTY
BOARD OF APPEALS
OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS
Stella B. Werner Council Office Building
Rockville, Maryland 20850
(240) 777-6660**

**IN THE MATTER OF:
OLUWASEYI AGBELUSI**

Petitioner

Oluwaseyi Agbelusi
For the Petitioner

Elba Benitez

Department of Housing and
Community Affairs

Kenneth E. Sealls

Opposed to the Petition

Report and Recommendation by: Tammy J. CitaraManis, Hearing Examiner

Board of Appeals No. S-2808
(OZAH No. 11-32)

HEARING EXAMINER'S REPORT AND RECOMMENDATION

TABLE OF CONTENTS

I. STATEMENT OF THE CASE.....	2
II. FACTUAL BACKGROUND.....	3
A. The Subject Property and Its Current Use.....	3
B. The Surrounding Neighborhood.....	7
C. The Master Plan.....	8
D. The Proposed Use.....	11
E. Traffic Impacts.....	13
F. Environmental Impacts	14
G. Community Response	14
III. SUMMARY OF THE HEARING	16
A. Petitioner's Case.....	16
B. Public Agency Testimony	17
C. Opposition testimony.....	18
IV. FINDINGS AND CONCLUSIONS	19
A. Standard for Evaluation.....	20
B. General Standards.....	22
C. Specific Standards	29
D. Additional Applicable Standards	34
V. RECOMMENDATION	35

I. STATEMENT OF THE CASE

In Petition No. S-2808, Oluwaseyi Agbelusi, seeks approval of a Special Exception under Zoning Ordinance §59-G-2.00 to allow an accessory apartment on property located at 3821 Palmira Lane Silver Spring, Maryland. The legal description of the property is Lot13, Block 4 in the Harmony Hills Subdivision, and it has Tax Account No. 01321240. The property is zoned R-60. Exhibit 1.

On May 4, 2011, the Board of Appeals issued a notice of a public hearing before the Hearing Examiner for September 2, 2011. Exhibit 11(b). Technical Staff of the Maryland-National Capital Park and Planning Commission (M-NCPPC), in its report dated August 18, 2011, recommended approval of the Petition, with conditions. Exhibit 13.¹

The Department of Housing and Community Affairs (DHCA) inspected the property on July 12, 2011. Housing Code Inspector Elba Benitez reported her findings in a memorandum dated August 31, 2011. The inspector concluded that occupancy of the apartment is limited to no more than two (2) unrelated persons or a family of four based on approximately 508 square feet of habitable space.² The inspector also reported that Petitioner is required to replace a double cylinder dead bolt lock with a single thumb turn lock and bring the egress windows in the three bedrooms up to code. Exhibit 12. By memorandum dated September 2, 2011, DHCA (Licensing and Registration), indicated that there was one other active accessory apartment and a Registered Living Unit (RLU)³, both located South of Palmira Lane outside the defined neighborhood boundary. Exhibit 16.

¹ The Technical Staff report is frequently quoted and paraphrased herein.

² Ms. Benitez testified at the hearing that she inadvertently omitted this information from her report. Tr. 12 and 55.

³ DHCA indicated that the RLU was eliminated and removed.

A public hearing was convened as scheduled on September 2, 2011, and Petitioner appeared *pro se*. Petitioner executed an affidavit of posting. Exhibit 14. The record was held open until September 21, 2011, to give Petitioner time to supply a copy of his deed, which he timely filed on September 20, 2011. Exhibit 16. Petitioner adopted the findings in the Technical Staff report (Exhibit 13) and in the Housing Code Inspector's report (Exhibit 12), as his own evidence and agreed to meet all the conditions set forth in both reports. Tr. 10-13 Ms. Benitez testified on behalf of DHCA. Tr. 55-64 One individual, Kenneth E. Sealls, appeared in opposition to the Petition. Tr. 64-70

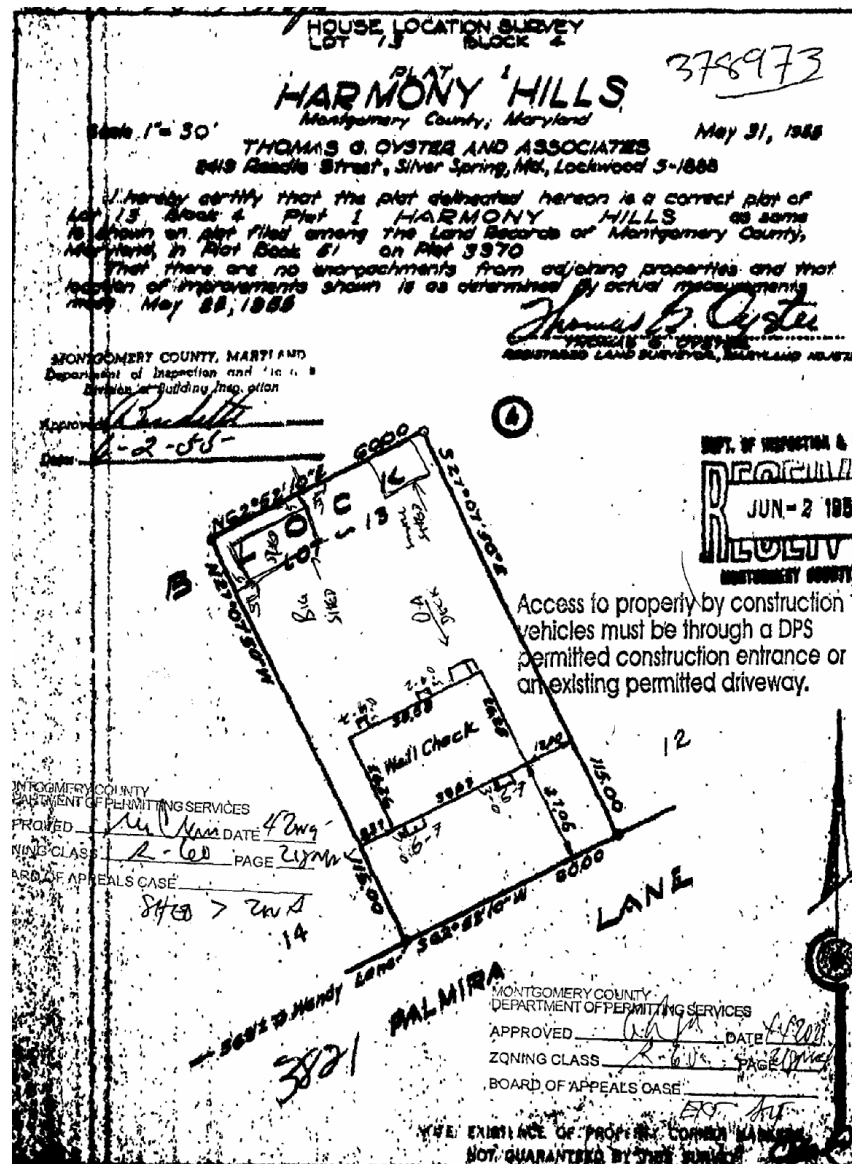
The record closed as scheduled on September 21, 2011. For the reasons set forth below, the Hearing Examiner recommends approval of the requested special exception, subject to the conditions set forth in Section V of this Report.

II. FACTUAL BACKGROUND

A. The Subject Property and Its Current Use

The subject property is located at 3821 Palmira Lane, on the north side of Palmira Lane just east of Lydia Street. It is zoned R-60. The lot is 6900 square feet in size, rectangular in shape and is improved with a one-story single family detached house with a basement, as shown on the following page in the Site Plan⁴ Exhibit 4:

⁴ During his presentation, Petitioner noted the addition of a second "small shed" in the northeast corner of the property and the approximate location of the existing deck (not drawn to scale) located on the northeast corner of the house. Tr. 17-20.



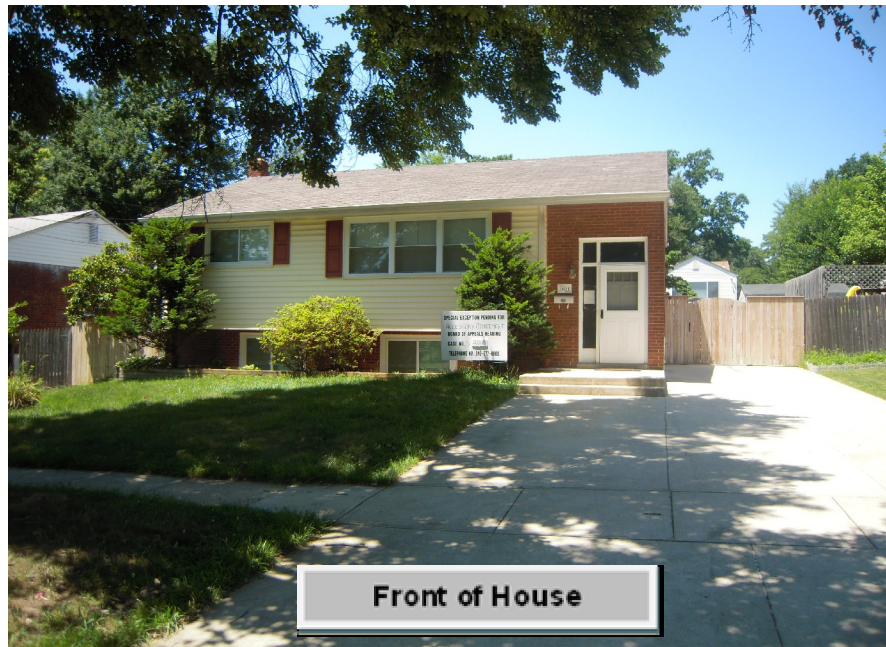
Technical Staff reports:

The existing one-story house was constructed in 1955 and is 1019 feet above ground with a basement the same size. The house is located in the middle of the lot, which gently slopes from back to front. The backyard is flat with a shed⁵ in the northwest corner of the property. There is a patio in the shape of a half-circle with raised planting beds encircling the edges. The deck appears new. The raised beds are made from bricks, some of which are out of place. The site has its sole access point from Palmira Lane. The driveway is approximately 19' x 37' long with plenty of space to

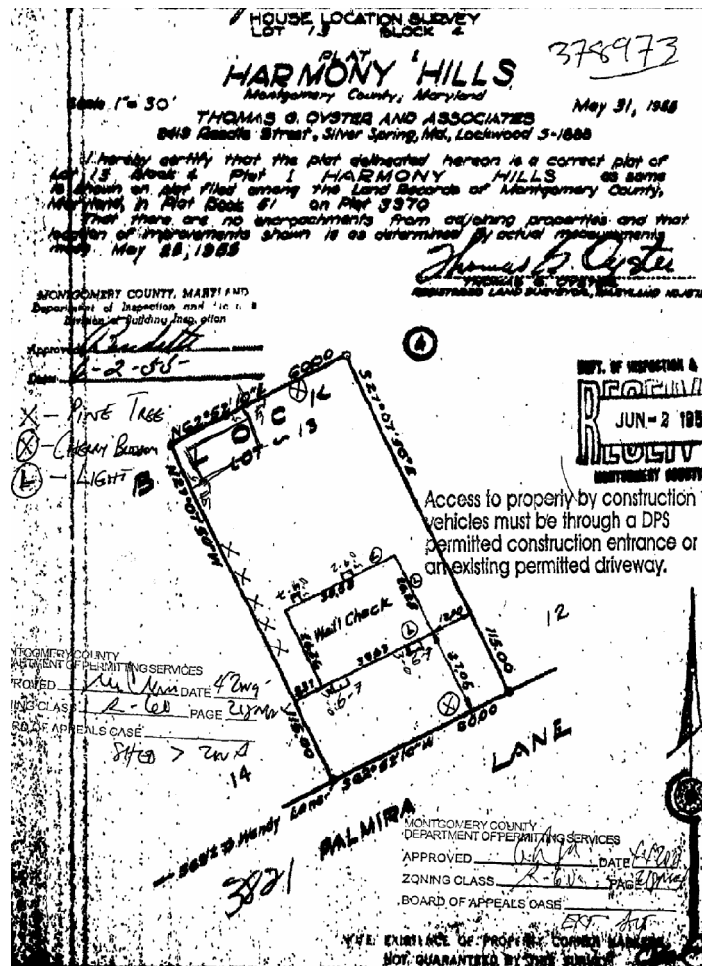
⁵ Petitioner identified this as the "Big shed" on the Site Plan marked as Exhibit 4. Tr. 20-21.

park four cars. There is additional on-street parking along Palmira Lane. (Exhibit 13, p. 3)

The front and rear of the home are shown in photographs from the Technical Staff report. Exhibit 13, pgs. 3-4:



The existing landscaping and lighting as shown below on the Landscape and Lighting Plan will remain unchanged (Exhibit 5):



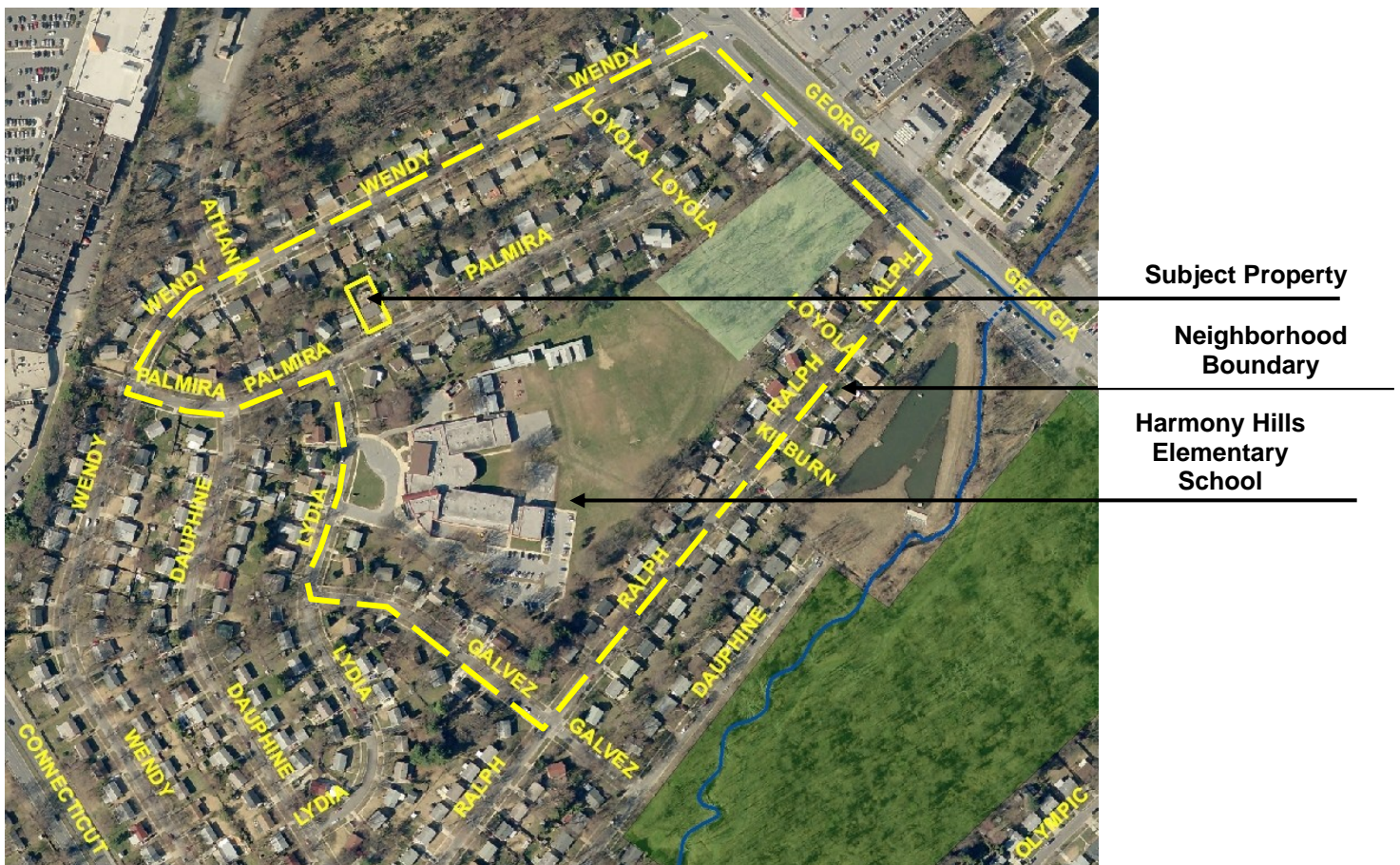
Technical Staff reports that the exterior of the house is in good condition and the property's existing landscaping is relatively well-maintained and falls within the standards expected for a typical one-family home. Staff advises that no external changes (other than repairs required by DHCA)⁶ or additional plantings are being proposed. Exhibit 13, p. 6.

⁶ See Exhibit 12.

Staff further advised that the existing lighting is residential in character and adequate. Exhibit 13, p. 2.

B. The Surrounding Neighborhood

Technical Staff provided an aerial map of the neighborhood surrounding the subject property as bound by Wendy Lane to the north, Harmony Hills Elementary School to the south, Georgia Avenue to the east, and Connecticut Avenue to the west. The defined neighborhood boundary, which “has been drawn to include any nearby properties that may be affected by a potential increase in density or traffic”, is depicted with a dashed line on the aerial map below (Exhibit 13, p. 4):



The Hearing Examiner accepts Technical Staff's definition of the neighborhood boundary as outlined in the aerial map shown above.

Technical Staff reports that all homes in the neighborhood are one-family detached homes, and the entire neighborhood is zoned R-60. According to Technical Staff, no other accessory apartment special exception uses exist within the defined neighborhood boundaries.⁷ Staff, however, noted that two other residences located within this area were granted special exceptions; one in 1974 for a 'home occupation' for individuals certified as permanently and totally disabled (Loyola Avenue) and one in 1976 for a general dentistry practice (Georgia Avenue). Staff concluded that "[t]he number of special exceptions is not excessive for the neighborhood." Exhibit 13, p. 4.

DHCA reports that there is one accessory apartment at 13309 Dauphine Street (license # 37457) and one exempt Registered Living Unit (RLU) at 8401 Galves Street (license # 39712). DHCA reported that the RLU was "eliminated/removed." Exhibit 15.

Considering the elimination of the RLU and that the accessory apartment noted by DHCA is outside the defined neighborhood boundary, the Hearing Examiner finds that the addition of one other accessory apartment in the surrounding neighborhood will not be excessive or change the residential character of the neighborhood.⁸

C. The Master Plan

The subject property is governed by the *Aspen Hill Master Plan*, approved and adopted in 1994. Exhibits 8. Technical Staff advises that there are no master plan

⁷ Staff reported that there are approximately 62 single-family detached homes in the defined neighborhood. Exhibit 13, p. 11.

⁸ The same conclusion would have been made even if the other accessory apartment was located within the defined neighborhood boundaries because the existence of one other accessory apartment in the neighborhood should have little or no impact on the subject case. Thus, the Hearing Examiner concurs with Staff's conclusion that "the number of special exceptions is not excessive for the neighborhood." Exhibit 13, p. 4.

recommendations relevant to this site or to accessory apartments. However, Staff noted that “the Plan does give general guidance supporting the expansion of housing choices within the area, including accessory apartments that contribute to the housing objectives of the Plan.”

Exhibit 13, p. 5. Accordingly, Staff found the special exception for an accessory apartment to be consistent with the master plan.

The Hearing Examiner agrees with Technical Staff because the Plan supports the R-60 zoning in which accessory apartments are a special exception use. In addition, this accessory apartment is not visible from the street and therefore does not change the existing structure’s appearance as a single-family dwelling consistent with the surrounding neighborhood.

The Hearing Examiner finds that Technical Staff has fairly characterized the Master Plans comments regarding accessory apartments supporting the expansion of housing choices within the area. Staff, however, did not address the Plan’s suggested guideline addressing the compatibility or permitted use of front-yard parking as part of special exception use request in residential communities. The Plan recommends that “[f]ront yard parking should be avoided because of its commercial appearance; however, in situations where side or rear yard parking is not available, front yard parking should be allowed only if it can be adequately landscaped and screened.” Exhibit 8, p. 80.

As clearly depicted in the photos shown in this report on page 5, the existing concrete driveway extends to the end of the front porch steps which allows for limited front-yard parking of one vehicle. The driveway is 19’x 37’ and according to Staff can accommodate four (4) vehicles, three of which are parked in a single row on the side of the house from the sidewalk to the fence. While limited front-yard parking exists for one space, the same is not needed or being requested as part of this special exception for Petitioner to meet the minimum

two (2) space off-street parking requirement. Thus, it is arguable that a determination as to the adequacy of the landscaping and screening is not necessary.

However, even assuming Petitioner needed the front-yard parking to satisfy the parking requirements, the question becomes what does the phrase “adequately landscaped and screened” mean in the context of this case? It should be noted that the Master Plan was likely contemplating special exceptions with a more commercial character, like the general dentistry practice special exception granted in 1976, than accessory apartments where the parking is inherently residential and only involves a couple of cars. Thus, how much landscaping and screening is adequate for an existing two-car wide driveway/parking pad for an accessory apartment use?

The photos of the front of the house as shown on page 5 of this report clearly show that there is no landscaping immediately surrounding the existing limited front-yard driveway/parking pad and no additional plantings are planned according to the Landscape and Lighting Plan (Exhibit 5). The large evergreen on the northwest corner of the dwelling screens that side of the property. The front of the dwelling also includes a large bush and another mature evergreen immediately to the west of the front door and porch steps. The southwest portion of the driveway (view from street) is shaded, although not “screened”, by a mature leafy cherry tree located in the street right-of way. The south eastern side of the driveway/parking pad appears to be right on the property, so it is unclear whether it could be screened from that side of the property without infringing on the neighbor’s property.

It is not uncommon for a single-family dwelling to have a driveway wide enough to park two vehicles side by side as in this case. The landscaping generally consists of street trees and additional plantings of varying sizes in front of the dwelling as is seen in this case.

The addition of one vehicle, even parked in a limited space in front of the house, does not create the appearance of commercial parking. The Hearing Examiner finds that requiring additional landscaping specifically around the driveway/parking pad would make it less compatible, rather than more compatible with the residential neighborhood. Considering these factors, the Hearing Examiner finds that Petitioner's driveway/parking pad is "adequately landscaped and screened." Thus, and for the reasons herein, it is fair to say that the planned use, an accessory apartment in a single-family detached home with limited front-yard parking, is not inconsistent with the goals and objectives of the *Aspen Hill Master Plan*.

D. The Proposed Use

The Petitioner is requesting approval of an existing accessory apartment located in the walk-out basement of his home. Technical staff advises that the apartment occupies 925 square feet of floor space out of a total of approximately 2,038 square feet of floor area. Staff reports that the "basement has a separate entrance and shares public utilities with the main home." Exhibit 13, p. 2.

Technical Staff reports:

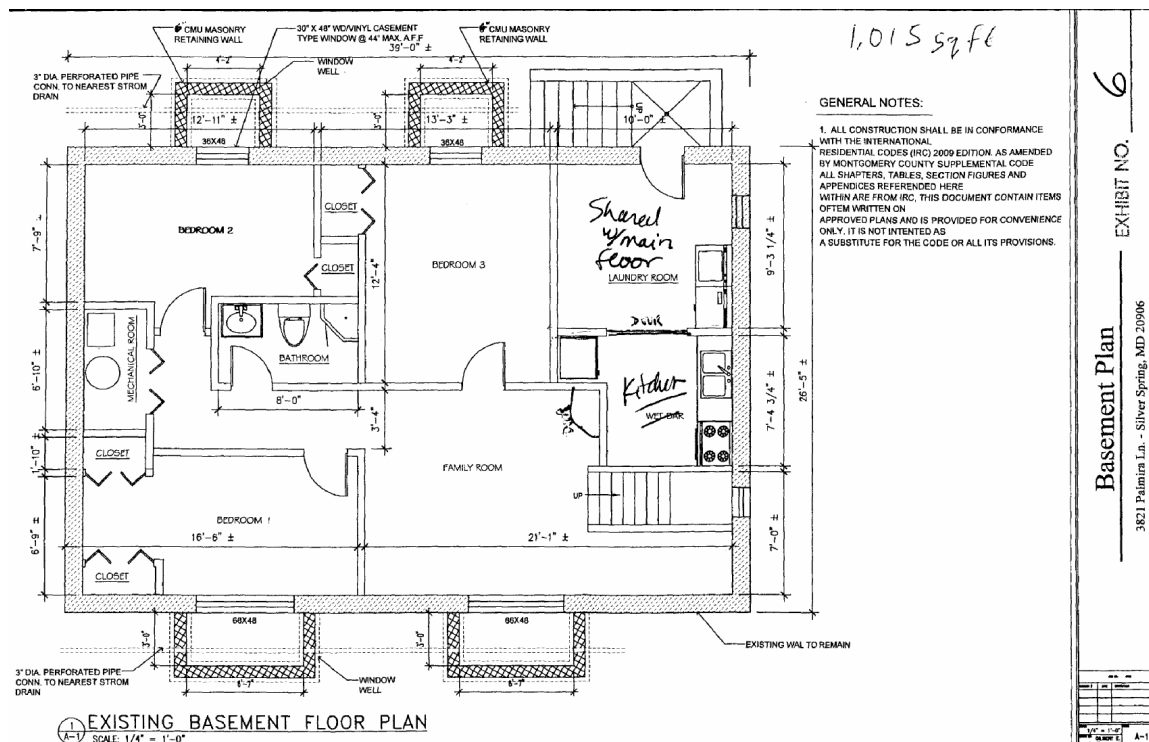
The accessory unit has a separate entrance apart from the main entrance to the dwelling. The apartment entrance is typical of a rear-entry door to a one-family house, making it difficult to distinguish from any other neighborhood home. The proposed walkway and grounds of the accessory apartment appear safe with illumination from a porch light on the deck of the main house and light to the right of the apartment entrance. This is typical residential standards. (Exhibit 13, p. 9)

Access to the accessory apartment is via a driveway connected to a concrete pathway in the rear of the dwelling which leads to the separate accessory apartment entrance. Tr. 26-27. This entrance is depicted on page 5 of this report and in the photos from Exhibit 9 (a) and (d).

Access to the accessory apartment entrance will be illuminated by two (2) motion

sensor lights; one on the northeast side of the dwelling and one to the right of the rear-entry to the main dwelling on the deck. There is also a porch light to the right of the accessory apartment entrance at the bottom of the steps. Exhibit 5; Tr. 23, 30-33. The Hearing Examiner agrees with Staff that the existing lighting is residential in character and adequate. Exhibit 13, p. 2

The apartment contains a kitchen area⁹, living room, three bedrooms and one bathroom and has access to the laundry room, shared with the main unit, as depicted in the floor plan, reproduced below:



DHCA inspected the property on July 12, 2011. Housing Code Inspector Elba Benitez reported her findings in a memorandum dated August 31, 2011, as follows:

1. Double cylinder dead bolt will have to be replaced with single thumb turn lock.

⁹ The kitchen area, as depicted on the floor plan (Exhibit 6), was previously identified as a “wet bar” and corrected based on the Housing Code Inspector’s testimony. Tr. p. 58.

2. Windows in bedroom must meet code standard for emergency egress. The windows shall be at least (5) square feet in net clear opening [and] have an opening height of 24” and a minimum net clear opening width of 20”, with the bottom opening not more than 44” above the floor.
3. No more than 2 unrelated individuals or a family of 4 may occupy the unit.
4. The driveway can accommodate 2 vehicles¹⁰ and there are no restrictions to off street parking.

Petitioner agreed to meet all the conditions set forth in the Housing Code Inspection report. Tr. 10-13; Exhibit 3.

The Inspector found that the total habitable area of the accessory apartment is approximately 508 square feet. Based on that fact, Ms. Benitez concluded that it may be occupied by no more than 2 unrelated persons or a family of four. Tr. 12, 55 and 57.

Technical Staff reported that there was plenty of room on the driveway, which measured 19’x 37’, to park at least four (4) vehicles, in addition to available on-street parking. Exhibit 13. The Housing Code Inspector’s finding that the driveway can accommodate at least three (3) or more cars is consistent with Staff’s finding. Petitioner parks two cars on the driveway and confirmed that there is on-street parking in front of his house. Tr. 37 and 73. The Hearing Examiner agrees with Staff that there is adequate parking for the accessory apartment on the driveway as well as additional on-street parking.

E. Traffic Impacts

Technical Staff advises that the requested special exception will generate one peak hour trip for the both uses on the property for a total of two peak hour trips. Exhibit 13, p.6. Due to the small scale of the proposed use, the Hearing Examiner has no basis in this record to disagree with the finding of Technical Staff and therefore agrees that the accessory apartment meets the requirements of Local Area Transportation Review

¹⁰ Ms. Benitez amended her report at the hearing and clarified that there was enough space on the driveway for “at least three (3) or more cars”. Tr. 37 and 56.

(“LATR”).

Similarly, Technical Staff concluded that the proposed accessory apartment generates fewer than four (4) trips and therefore is not subject to Policy Area Mobility Review (“PAMR”). There being no evidence in the record to the contrary, the Hearing Examiner so finds.

F. Environmental Impacts

Petitioner does not propose any external changes to the site with the exception of enlarging the window wells for the bedrooms and replacing the double cylinder dead bolt with a single thumb turn lock as required by DHCA. Technical Staff advises that the “site is located in the Upper Turkey Branch sub-watershed, a Use I/I-P designation [and noted] [t]here are no streams, wetlands, floodplains, or sensitive features of the site including forest, significant or specimen trees.” Exhibit 13, p. 6. Similarly, Staff reported that the property is exempt from the Forest Conservation Law and there are no environmental issues or concerns. *Id.*; see also Exhibit 7. Based on this evidence, the Hearing Examiner finds that Petitioner’s request will have no adverse environmental impacts.

G. Community Response

There was no pre-hearing community response to the special exception request. However, one neighborhood resident, Kenneth E. Sealls, who lives on Wendy Lane, testified in opposition to the petition primarily out of fear that the increased occupancy associated with the accessory apartment use will have negative effects on the residential character of neighborhood and contribute to the loss in value of his home. Mr. Sealls has lived in the neighborhood since 2003 and testified that in that time he has observed that homeowners are illegally overcrowding their single-family homes with roomers and boarders “who don’t

appear to be of the same family.” He believes that this increase in population has resulted in additional noise and an increase in the number of vehicles parked on individual lots and in the neighborhood. Mr. Sealls has also observed that homeowners are paving over grassy areas of their yard in order to extend their driveway to accommodate additional parking on their properties. He pointed out Petitioner’s driveway, as shown in Exhibit 9(a), as an example. Tr. 67-68 Mr. Sealls argued that this type of activity is inconsistent with the neighborhoods residential zoning which he believes has contributed to the loss in value of his home. Tr. 70-71. A summary of Mr. Sealls testimony is noted below in Section III.C.

Mr. Sealls admitted that his concerns and perceived negative effects of granting Petitioner’s request for an accessory apartment use was based on his belief that the overcrowded homes were operating without the required approval or license which would be a zoning enforcement issue. Mr. Sealls general complaint (i.e., that he opposes the grant of an accessory apartment in his neighborhood fearing that such use would have negative effects) cannot be a basis for denial because the Council has established its policy, through Zoning Ordinance §59-C-1.31(a), that accessory apartments are permitted as special exceptions in the R-60 Zone.

Thus, the Hearing Examiner must assess this case based on the statutory criteria for approving an accessory apartment special exception, not on whether the idea of having an accessory apartment in the neighborhood is unpopular. The decision on a zoning application “is not a plebiscite.” *Rockville Fuel v. Board of Appeals*, 257 Md. 183, 192, 262 A.2d 499, 504 (1970).

It should be noted, especially given Mr. Sealls concerns, that the granting of a special exception for a qualified site may confer benefits upon the community as well as the

Petitioner. Specifically, conditions are routinely established in such special exception grants, as in this case, which protect the community, and those conditions are enforced by regular inspections. The Hearing Examiner finds that the points raised by Mr. Sealls do not form the basis for denying the special exception petition before the Hearing Examiner for the reasons stated herein.

III. SUMMARY OF THE HEARING

Petitioner testified at the public hearing in support of the petition. Ms. Elba Benitez, a DHCA inspector, also testified as to compliance with the Housing Code. Mr. Kenneth E. Sealls testified at the hearing in opposition to the petition.

A. Petitioner's Case

Mr. Oluwaseyi Agbelusi:

Petitioner, Oluwaseyi Agbelusi, executed an affidavit of posting (Exhibit 14) and timely supplied a copy of the deed to the subject property. Exhibit 16. Petitioner adopted the findings in the Technical Staff report (Exhibit 13) and in the DHCA Housing Code Inspector's report (Exhibit 12) as his own evidence and agreed to comply with all the conditions set forth in both reports. Tr. 10-13.

Petitioner testified that he purchased the property in 2008 and he and his wife occupy the main level of the dwelling which also includes a basement apartment that is vacant. Petitioner identified the photographs and plans marked into evidence and stated that they fairly and accurately represented existing conditions on the property. Tr. 21-24. The driveway can accommodate four (4) cars and there is on-street parking. Petitioner parks two cars on the driveway. Petitioner noted that he did not extend the driveway and it is in the same condition and size as when he purchased it in 2008. Tr. 22, 37, 75 and 76.

Petitioner installed the fence in the backyard and two (2) motion sensor lights on the north side and rear of the dwelling. Tr. 33 and 38. Petitioner modified the Site Plan (Exhibit 4) to show the deck on the right rear corner of the house and a second shed located in the north-east corner of fenced backyard. Tr. 17-21.

Petitioner testified that the basement apartment has a separate rear entrance accessed from the driveway which connects to a concrete pathway leading to a stairwell located under the deck. Tr. 23 and 61. Access to the accessory apartment is illuminated by the two (2) motion sensor lights as shown on the Landscape and Lighting Plan (Exhibit 5) as well as a light to the right of the apartment entrance. Tr. 30-33.

Petitioner testified that the accessory apartment has a kitchen, living room, three bedrooms and one bathroom. The laundry room is shared with the main dwelling which was noted on the floor plan (Exhibit 6). Petitioner installed two doors, one from the laundry room to the kitchen and one from the kitchen to the living room. Tr. 34-36. Petitioner testified that there would be no exterior changes to the dwelling other than those repairs listed in the Housing Inspector's report. Tr. 37-38.

B. Public Agency Testimony

Housing Code Inspector Elba Benitez:

Ms. Benitez testified that her Memorandum dated August 31, 2011, accurately listed the conditions that needed to be repaired on the subject property. Exhibit 12. Specifically, Petitioner is required to replace the double cylinder dead bolt with a single thumb turn lock and to bring the egress windows in the bedrooms up to code. Tr. 55. The apartment is vacant and no interior violations were found at the time of the inspection. Tr. 65. Ms. Benitez testified that the kitchen area is incorrectly identified as a "wet bar" on the floor plan. Exhibit

6; Tr. 58.

Ms. Benitez testified that the total habitable area of the accessory apartment is approximately 508 square feet which she noted did not include the shared laundry room or kitchen area. Ms. Benitez excluded the kitchen area as habitable space because it was less than seven feet (7) in width. Tr. 59. Accordingly, Ms. Benitez concluded that “no more than 2 unrelated individuals or a family of 4 may occupy the unit.” Tr. 55.

At the hearing, Ms. Benitez corrected the number of vehicles which can be parked on the driveway from 2 vehicles to “at least 3 or more” vehicles. Tr. 56. Ms. Benitez estimated there was space to park three small vehicles in a row (on the longest section of the driveway which extends from the sidewalk to the fence) and two side by side in front of the house. Ms. Benitez also confirmed there were no off-street parking restrictions. Tr. 58.

Ms. Benitez also testified that DHCA (Licensing and Registration) identified one active accessory apartment located at 13309 Dauphine Street and one exempt RLU located at 8401 Galves Street. Exhibit 15. Ms. Benitez confirmed that the RLU has been identified as “eliminated/removed”. Tr. 62.

C. Opposition testimony

Mr. Kenneth E. Sealls:

Mr. Kenneth Sealls, who lives on Wendy Lane, testified in opposition to the Petition. Mr. Sealls stated that he has a diagonal view of Petitioner’s property which he described as being one house southeast behind his property. At this distance, he said he can hear loud parties on Petitioner’s deck, with a bright light beaming into his backyard. Tr.67.

Mr. Sealls has lived in the neighborhood since 2003 and testified that in that time he has observed that homeowners are illegally overcrowding their single-family homes with

roomers and boarders “who don’t appear to be of the same family.” An increase in population has resulted in additional noise and an increase in the number of vehicles parked on individual lots and in the neighborhood. Mr. Sealls has also observed that homeowners are paving over grassy areas of their yard in order to extend their driveway to accommodate additional parking on their properties. He pointed out Petitioner’s driveway, as shown in Exhibit 9(a), as an example. Tr. 67-68 Mr. Sealls argued that this type of activity is inconsistent with the neighborhoods residential zoning which he believes has contributed to the loss in value of his home. Tr. 70-71.

Mr. Sealls acknowledged he was pleased that the Petitioner is seeking the necessary approval for the accessory apartment, even though he remained opposed to the Petition for the reasons stated above. Tr. 69. However, Mr. Sealls noted for the record, after an informal conversation with Petitioner, that he believes the loud parties and bright light previously mentioned did not come from Petitioner’s property but from an adjacent neighbor. Tr. 79.

IV. FINDINGS AND CONCLUSIONS

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards and conditions are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning statute establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable general and specific standards. Technical Staff concluded that Petitioner will have satisfied all the requirements to obtain the special exception if he complies with the recommended conditions. Exhibit 13.

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Code 59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use as long as Petitioner complies with the recommended conditions set forth in Part V, below.

A. Standard for Evaluation

The standard for evaluation prescribed in Code Section 59-G-1.21 requires consideration of the inherent and non-inherent adverse effects of the proposed use at the proposed location, on nearby properties and the in general neighborhood. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code, Section 59-G-1.21. Inherent adverse effects alone are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with an accessory apartment. Characteristics of the proposed accessory apartment that are consistent with the “necessarily associated” characteristics of accessory apartments will be considered inherent adverse effects, while those characteristics of the proposed use that are not necessarily associated with accessory apartments, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must

then be analyzed to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff lists the following inherent characteristics of accessory apartments (Exhibit 13, p. 8):

- (1) The existence of the apartment as a separate entity from the main living unit but sharing a party wall with it;
- (2) The provision within the apartment of the necessary facilities, spaces, and floor area to qualify as habitable space under the applicable Code provisions;
- (3) A separate entrance and walkway and sufficient exterior lighting;
- (4) Sufficient parking;
- (5) The existence of an additional household on the site with resulting additional activity including more use of the outdoor space and more pedestrian, traffic, and parking activity; and
- (6) The potential for additional noise.

The Hearing Examiner concludes that, in general, an accessory apartment has characteristics similar to a single-family residence, with only a modest increase in traffic, parking and noise that would be consistent with a larger family occupying a single-family residence. Thus, the inherent effects of an accessory apartment would include the fact that an additional resident (or residents) will be added to the neighborhood, with the concomitant possibility of an additional vehicle or two.

Technical Staff found: “[t]here are no adverse effects the will negatively impact the community above and beyond those necessarily inherent to an accessory apartment.” Exhibit 13, p. 9. In support of this conclusion, Staff summarized the evidence as follows:

The apartment will be located in the basement of the main dwelling and is non-identifiable from the street. The apartment is set up to provide all the spaces and facilities necessary for an apartment use.

The accessory unit has a separate entrance apart from the main entrance to the dwelling. The apartment entrance is typical of a rear-entry door to a one-family house, making it difficult to distinguish from any other neighborhood home. The proposed walkway and grounds of

the accessory apartment appear safe with illumination from a porch light on the deck of the main house and light to the right of the apartment entrance [consistent with] typical residential standards.

Parking for the accessory apartment will be sufficient. There is space for four vehicles to park along the property's driveway. There are adequate choices to ensure sufficient neighborhood parking even with the existence of an additional household on the block.

The operational and physical characteristics of the proposed accessory apartment are consistent with the inherent characteristics of an accessory apartment use. There are no non-inherent adverse effects present in this case.

Based on the evidence in this case, and considering the size, scale, scope, light, noise, traffic and environment, the Hearing Examiner agrees with Technical Staff and concludes there are no non-inherent adverse effects from the proposed use.

B. General Standards

The general standards for a special exception are found in Section 59-G-1.21(a). The Technical Staff report, DHCA Housing Code Inspector report, and the Petitioner's written evidence and testimony provide sufficient evidence that the general standards would be satisfied in this case, as outlined below.

Sec. 59-G-1.21. General conditions.

§5-G-1.21(a) *A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

(1) Is a permissible special exception in the zone.

Conclusion: An accessory apartment is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and

requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.00 for an accessory apartment, as outlined in Section IV.C, below.

(3) *Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject property is covered by the 1994 Aspen Hill Master Plan. The Plan does not explicitly address the question of accessory apartments. However, the Plan does give general guidance supporting the expansion of housing choices within the area, including accessory apartments that contribute to the housing objectives of the Plan.” The Plan also supports the R-60 zoning, which permits accessory apartments as special exceptions. Exhibit 8. The Technical Staff concluded that the proposed accessory apartment would be consistent with the Master Plan. Exhibit 12, p. 5. The requested special exception will maintain the residential character of the area because Petitioner plans no external structural modifications to the existing single-family dwelling (other than repairs required by DHCA). The

Hearing Examiner finds that the existing driveway/parking pad, which allows for limited front-yard parking of one of four parking spaces provided on the existing driveway/parking pad is “adequately landscaped and screened” as more fully explained in Section II.C of this report on page 8. Exhibit 8, p. 80. Thus, and for the reasons herein, it is fair to say that the planned use, an accessory apartment in a single-family detached home with limited front-yard parking, is not inconsistent with the goals and objectives of the *Aspen Hill Master Plan*.

- (4) *Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The accessory apartment will be located in the rear of an existing dwelling and will not require any significant external changes. It therefore will maintain its residential character. There will be sufficient parking, both on- and off-street, and traffic conditions will not be affected adversely, according to Transportation Planning Staff. Exhibit 13, p. 5.

Technical Staff also found, considering the existence of two special exceptions which were granted in 1974 (‘home occupation’ for individuals certified as permanently and totally disabled on Loyola Avenue) and 1976 (general dentistry on Georgia Avenue), that the number of special exceptions are not excessive for the neighborhood. Exhibit 13, p. 4. DHCA identified similar uses, an (active) accessory apartment and (eliminated/removed) RLU, in the surrounding neighborhood, just south of the defined neighborhood boundary.

Exhibit 15. Considering the elimination of the RLU and that the existing accessory apartment noted by DHCA is outside the defined neighborhood boundary, the Hearing Examiner finds that the addition of one other accessory apartment in the surrounding neighborhood will not be excessive or change the residential character of the neighborhood. Based on these facts and the other evidence of record, the Hearing Examiner concludes, as did Technical Staff, that the proposed use will be in harmony with the general character of the neighborhood.

- (5) *Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Because the proposed accessory apartment presents only minimal impacts to the immediate area, the Hearing Examiner finds that the special exception will not be detrimental to the use, peaceful enjoyment, economic value, or development of the surrounding properties or the defined neighborhood, provided that the special exception is operated in compliance with the listed conditions of approval.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Technical Staff found that the lighting on the property is adequate and residential in character. Exhibit 13, p. 2. There will be two (2) motion sensor lights illuminating the apartment access; one on the north side of the dwelling and one to the right of the rear-entry door to the main dwelling on the deck.

There is also a light next to the accessory apartment entrance located at the bottom of the steps. The Hearing Examiner agrees with Technical Staff that the proposed lighting is residential in nature. Since the use will be indoors and residential, it will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the subject site. The Hearing Examiner so finds.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Based on a combined reading of reports by Technical Staff (Exhibit 13) and DHCA (Exhibit 15), there are two existing special exceptions ('home occupation' for individuals certified as permanently and totally disabled and general dentistry practice) located within the defined neighborhood boundary and at the most, one accessory apartment on Lydia Street, in the surrounding neighborhood. Because proposed use is residential by definition and presents only minimal impacts to the immediate area, the Hearing Examiner finds that the addition of one other accessory apartment in the surrounding neighborhood will not increase the number, scope, or intensity of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or*

workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

Conclusion: The evidence supports the conclusion that the proposed use would not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff indicates that the subject site will be adequately served by existing public facilities (Exhibit 13, p. 12), and the evidence supports this conclusion.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*

- (B) *If the special exception:*

(i) does not require approval of a new preliminary plan of subdivision; and

(ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same or greater than the special exception's impact;

then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the special exception application was submitted.

Conclusion: The special exception sought in this case will not require approval of a preliminary plan of subdivision. Therefore, the Board must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards. These standards include Local Area Transportation Review (“LATR”) and Policy Area Mobility Review (PAMR). As indicated in Part II. E. of this report, Transportation Planning Staff did conduct such a review and concluded that the proposed accessory apartment use would add one additional trip during each of the peak-hour weekday periods. Since the existing house, combined with the proposed accessory apartment, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. For the same reason, PAMR is also satisfied. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the instant petition meets all the applicable Growth Policy standards.

(C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Based on the evidence of record, especially given the availability of off-street and on-street parking at the site and the limited number of additional trips generated by the special exception, the Hearing Examiner finds that the use will not cause a traffic hazard on the public roadways abutting the

property and will not reduce the safety of vehicular or pedestrian traffic.

Exhibit 13, p. 7.

C. Specific Standards

The testimony and exhibits of record, especially the Technical Staff Report (Exhibit 13), provide sufficient evidence that the specific standards required by Section 59-G-2.00 are satisfied in this case, as described below.

Sec. 59-G-2.00. Accessory apartment.

A special exception may be granted for an accessory apartment on the same lot as an existing one-family detached dwelling, subject to the following standards and requirements:

(a) Dwelling unit requirements:

(1) Only one accessory apartment may be created on the same lot as an existing one-family detached dwelling.

Conclusion: Only one accessory apartment is proposed.

(2) The accessory apartment must have at least one party wall in common with the main dwelling on a lot of one acre (43,560 square feet) or less. On a lot of more than one acre, an accessory apartment may be added to an existing one-family detached dwelling, or may be created through conversion of a separate accessory structure already existing on the same lot as the main dwelling on December 2, 1983. An accessory apartment may be permitted in a separate accessory structure built after December 2, 1983, provided:

- (i) The lot is 2 acres or more in size; and*
- (ii) The apartment will house a care-giver found by the Board to be needed to provide assistance to an elderly, ill or handicapped relative of the owner-occupant.*

Conclusion: The apartment is located in the walk-out basement of an existing dwelling and therefore shares a wall in common, as required for a lot of this size (under an acre).

- (3) *An addition or extension to a main dwelling may be approved in order to add additional floor space to accommodate an accessory apartment. All development standards of the zone apply. An addition to an accessory structure is not permitted.*

Conclusion: No new addition or extension of the main dwelling is proposed. The accessory apartment will be located in a walk-out basement of an existing (one-story) single-family detached dwelling.

- (4) *The one-family detached dwelling in which the accessory apartment is to be created or to which it is to be added must be at least 5 years old on the date of application for special exception.*

Conclusion: The house was built in 1955. Exhibit 13, p. 3. It therefore meets the “5 year old” requirement.

- (5) *The accessory apartment must not be located on a lot:*

- (i) *That is occupied by a family of unrelated persons; or*
- (ii) *Where any of the following otherwise allowed residential uses exist: guest room for rent, boardinghouse or a registered living unit; or*
- (iii) *That contains any rental residential use other than an accessory dwelling in an agricultural zone.*

Conclusion: The use as proposed does not violate any of the provisions of this subsection; a requirement that occupancy of both the main dwelling and the accessory apartment meet all Code requirements is recommended as a condition of this approval.

- (6) *Any separate entrance must be located so that the appearance of a single-family dwelling is preserved.*

Conclusion: Access to the accessory apartment is via a driveway connected to a concrete pathway in the rear of the dwelling which leads to an existing separate accessory apartment entrance. No exterior changes to the structure are

proposed except those required by DHCA. There will thus be no change to the residential appearance of the dwelling.

- (7) *All external modifications and improvements must be compatible with the existing dwelling and surrounding properties.*

Conclusion: Petitioners are not proposing any new construction or modifications to the exterior of the dwelling, with the exception of enlarging the wells surrounding the basement bedroom windows and making the repairs required by DHCA. The Hearing Examiner finds that these changes, necessary for residential occupancy, will not affect the residential nature of the structure.

- (8) *The accessory apartment must have the same street address (house number) as the main dwelling.*

Conclusion: The accessory apartment will have the same address as the main dwelling.

- (9) *The accessory apartment must be subordinate to the main dwelling. The floor area of the accessory apartment is limited to a maximum of 1,200 square feet.*

Conclusion: The accessory apartment is subordinate to the main dwelling and under 1,200 square feet, as it occupies approximately 925 square feet of space (only 508 square feet of which is habitable space) in Petitioner's existing 2,038 square-foot home. Exhibit 13, p. 3. The Hearing Examiner finds that the apartment is subordinate to the main dwelling.

59-G § 2.00(b) Ownership Requirements

- (1) *The owner of the lot on which the accessory apartment is located must occupy one of the dwelling units, except for bona fide temporary absences not exceeding 6 months in any 12-month period. The period of temporary absence may be increased by the Board upon a finding that a hardship would otherwise result.*

Conclusion: The Petitioner will live in the upper level of the dwelling.

- (2) *Except in the case of an accessory apartment that exists at the time of the acquisition of the home by the Petitioner, one year must have elapsed between the date when the owner purchased the property (settlement date) and the date when the special exception becomes effective. The Board may waive this requirement upon a finding that a hardship would otherwise result.*

Conclusion: According to the deed submitted into the record, Petitioner purchased the home in 2008. Exhibit 16. The one-year rule has therefore been satisfied.

- (3) *Under no circumstances, is the owner allowed to receive compensation for the occupancy of more than one dwelling unit.*

Conclusion: The Petitioner will receive compensation for only one dwelling unit as a condition of the special exception.

- (4) *For purposes of this section owner means an individual who owns, or whose parent or child owns, a substantial equitable interest in the property as determined by the Board.*

Conclusion: Petitioner has submitted a deed dated November 4, 2008, evidencing ownership in his name. Exhibit 16. Therefore, the Hearing Examiner concludes that this condition has been met.

- (5) *The restrictions under (1) and (3) above do not apply if the accessory apartment is occupied by an elderly person who has been a continuous tenant of the accessory apartment for at least 20 years.*

Conclusion: Not applicable.

59-G § 2.00(c) Land Use Requirements

- (1) *The minimum lot size must be 6,000 square feet, except where the minimum lot size of the zone is larger. A property consisting of more than one record lot, including a fraction of a lot, is to be treated as one lot if it contains a single one-family detached dwelling lawfully constructed prior to October, 1967. All other development standards of the zone must also apply, including setbacks, lot width, lot*

coverage, building height and the standards for an accessory building in the case of conversion of such a building.

Conclusion: The subject property consists of a single lot that is approximately 6,900 square feet in size, and therefore satisfies this requirement. The following chart from the Technical Staff report (Exhibit 13, p.7) demonstrates compliance with all development standards for the R-60 zone:

Development Standard	Min/Max Required	Provided	Applicable Zoning Provision
Maximum Building Height	2.5 stories	1 story	§ 59-C-1.327
Minimum Lot Area	6,000 sq. ft.	6,900 sq. ft.	§ 59-C-1.322(a)
Minimum Lot Width at Front Building Line	60 ft.	86 ft.	§ 59-C-1.322(b)
Minimum Lot Width at Street Line	25 ft.	69 ft.	§ 59-C-1.322(b)
Minimum Setback from Street	25 ft.	25 ft.	§ 59-C-1.323(a)
Minimum Rear Yard Setback	20 ft.	20 ft.	§ 59-C-1.323(b)(2)
Maximum Building Coverage	35 percent	Approx. 14.7 percent	§ 59-C-1.328
Maximum Floor Area for Accessory Apartment	1,200 sq. ft.	925 sq. ft.	§ 59-G-2.00(a)(9)

(2) An accessory apartment must not, when considered in combination with other existing or approved accessory apartments, result in excessive concentration of similar uses, including other special exception uses, in the general neighborhood of the proposed use(see also section G-1.21 (a)(7) which concerns excessive concentration of special exceptions in general).

Conclusion: Based on a combined reading of reports by Technical Staff (Exhibit 13) and DHCA (Exhibit 15), there are two existing special exceptions ('home

occupation' for individuals certified as permanently and totally disabled and general dentistry practice) located within the defined neighborhood boundary and at the most, one accessory apartment on Lydia Street, in the surrounding neighborhood. Because the proposed use is residential by definition and presents only minimal impacts to the immediate area, the Hearing Examiner finds that the proposed special exception will not create an excessive concentration of similar uses.

(3) Adequate parking must be provided. There must be a minimum of 2 off-street parking spaces unless the Board makes either of the following findings:

- (i) More spaces are required to supplement on-street parking; or*
- (ii) Adequate on-street parking permits fewer off-street spaces.*

Off-street parking spaces may be in a driveway but otherwise must not be located in the yard area between the front of the house and the street right-of-way line.

Conclusion: Technical Staff concluded that the 19'x 37' driveway can accommodate four (4) vehicles and there is additional on-street parking along Palmira Lane.

Exhibit 13, pgs. 3 and 6. DHCA similarly concluded that there was sufficient space on the driveway to accommodate "at least 3 or more" cars with no off-street parking restrictions. Petitioner testified that he parks two (2) vehicles on the property. The Hearing Examiner finds, therefore, that the minimum requirement of two (2) off-street parking spaces has been met and there is sufficient parking to support the proposed use.

D. Additional Applicable Standards

Not only must an accessory apartment comply with the zoning requirements as set forth in 59-G, it must also be approved for habitation by the Department of Housing and

Community Affairs. As discussed in Part II. D. of this Report, the Housing Code Inspector's report (Exhibit 12) notes certain issues, and recommends that occupation of the accessory apartment be limited to no more than two unrelated persons or a family of four. As mentioned above, Petitioners have agreed to meet all conditions, and will make the repairs required by the Housing Code Inspector.

V. RECOMMENDATION

Based on the foregoing analysis, I recommend that Petition No. S-2808, which seeks a special exception for an accessory apartment to be located at 3821 Palmira Lane, Silver Spring, Maryland, be **GRANTED**, with the following conditions:

1. The Petitioner is bound by his testimony, representations and exhibits of record;
2. The Petitioner must make the repairs needed to comply with the conditions set forth in the Memorandum of Elba Benitez, Housing Code Inspector, Division of Housing and Community Affairs (Exhibit 12):
 - (1). Double cylinder dead bolt will have to be replaced with single thumb turn lock.
 - (2). Windows in bedroom must meet code standard for emergency egress. The windows shall be at least (5) square feet in net clear opening [and] have an opening height of 24" and a minimum net clear opening width of 20", with the bottom opening not more than 44" above the floor.
3. Based on a habitable space in the accessory apartment (508 square feet), no more than two (2) unrelated persons or a family of four may reside in the accessory apartment;
4. The main dwelling unit must not be occupied by a family of unrelated persons;
5. Petitioner must occupy one of the dwelling units on the lot on which the accessory apartment is located;
6. Petitioner's must make parking spaces available for their accessory apartment tenants, either on the existing driveway or on the street directly in front of Petitioner's home;
7. Petitioner must not have a guest room for rent, a boardinghouse or a registered living

unit, in addition to the accessory apartment, and must not receive compensation for the occupancy of more than one dwelling unit; and

8. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioners shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: October 18, 2011

Respectfully submitted,

Tammy J. CitaraManis
Hearing Examiner